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C O N F I D E N T I A L SECTION 01 OF 04 KATHMANDU 000128

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SUBJECT: NEPAL'S CONSTITUTION DRAFTING MOVES AHEAD

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Classified By: Charge d'Affaires, a.i., Donald A. Camp 1.4 (b/d).

11. (C) SUMMARY: Nepal's 601-person Constituent Assembly (CA) is making steady progress drafting a new constitution. The CA's eleven thematic committees have submitted reports, and drafting has begun. While the committees reached agreement on many key constitutional provisions, there are at least five issues that touch on parties' core political and ideological interests and will require difficult compromises: federalism, form of government, electoral system, land reform, and judicial independence. The CA is unlikely to meet the May 28 deadline for completing the new constitution, and could extend its mandate for another six months. An extension may be the preferred solution, if the extra time facilitates consensus, public support, and careful drafting. If the CA does not extend its mandate or complete the constitution on time, the country would fall into a "constitutional void," raising the possibility of a presidential takeover or military coup. Post considers this latter scenario unlikely, but will track closely. END SUMMARY.

12. (C) This report draws on PDAS Moon's January 18 meeting with Constituent Assembly Speaker Nembang, Charge's meetings with Unified Communist Party of Nepal-Maoist Chairman Pushpa Kamal Dahal "Prachanda" (reftel) and Communist Party of Nepal-United Marxist-Leninist (UML) Chairman Jhalanath Khanal (septel); and EmbOff's meetings with the key lawyers for the three major parties: Khim Lal Devkota (Maoist), Agni Kharel and Sapana Malla (UML), and Radheshyan Adhikari (Nepali Congress). EmbOff also met with presidential legal advisor Surya Dungal and Center for Constitutional Development (CCD) advisors Marcus Brand and Budi Karki.

Committee Reports Filed, Tight Timeline

13. (SBU) The Constituent Assembly's eleven "thematic committees" -- which debated topics from land reform to the national anthem -- have sent their reports to the full CA, the last report on "state restructuring" having been presented January 31. The 63-member Constitutional

Committee, which includes most of the key party leaders and constitutional lawyers, started drafting constitutional text on February 5, drawing on (but not bound by) the finalized committee reports. Under the current CA schedule, the drafting should be complete by March 5, followed by three weeks of public discussions, additional CA debate, amendments, and ultimately promulgation of the new constitution no later than May 28, 2010.

14. (C) Although CA Speaker Nembang says he is "hopeful" the constitution will be finished in the stipulated time, those involved in the drafting report privately that the proposed timetable is unrealistic. The eleven committee reports overlap, contradict themselves, and contain hundreds of "dissenting views." Sapana Malla, one of the key UML attorneys, told EmbOff that the Constitutional Committee's "realistic goal" is to finish a draft constitution by May 28, then request a six-month extension for debate and amendment. In addition, most civil society activists believe the three-week public consultation period, which was originally scheduled for three months, is too short, particularly since this will be Nepal's first democratically-drafted constitution.

15. (SBU) At least two-thirds of the CA must approve the final constitution, which puts the Maoists, with 40 percent of the CA seats, in a particularly strong negotiating position. The next two largest parties: the Nepali Congress (with 19 percent of the seats) and UML (18 percent) could join forces to block final approval. The various Terai-based parties

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hold about 14 percent of the vote, and will wield significant influence, especially if the three major parties cannot reach consensus.

Tough Issues Ahead

16. (SBU) During the debate over the past year, the eleven committees significantly narrowed the number of outstanding issues, with a surprising degree of consensus among the parties, including the Maoists. However, we assess that there are at least five major constitutional issues that affect parties' core political and ideological interests and will require difficult political compromises.

Federalism/State Restructuring

17. (SBU) Perhaps the toughest and most politically-sensitive issue, "state restructuring" or federalism divides Nepalis along ethnic and caste lines. Nepal's previously disadvantaged communities -- from Terai's Madhesis to "janajati" ethnic groups like the Tharus and Limbus -- view federalism as a way to gain economic and political power and want states drawn largely along ethnic lines. The Maoists cleverly claimed this issue as their own in the campaign, and other major parties have reluctantly played along for political reasons -- despite the strong reservations of Nepal's traditional Brahman/Chettri elite, who generally oppose federalism or want fewer states based purely on geography.

18. (SBU) In its report, the Committee on State Restructuring recommended a 14-state system, with boundaries drawn largely along ethnic and linguistic lines (map emailed to SCA/INSB), supported by the Maoists and elements of the UML. The Nepali Congress supports an alternative six-state map. The Terai-based parties reject both proposals, calling for one state covering the entire Terai region ("one madhes, one pradesh"), which is unrealistic but politically potent (setting the stage for future protests). UML leader Jhalanath Khanal told Charge he believes the various groups will ultimately be forced to compromise, ending up with perhaps eight to ten states. The major parties generally agree on the scope of the devolution of power.

Form of Government: President vs. Parliament

¶9. (SBU) The CA committee on Forms of Government narrowly approved the Maoist proposal to create a strong presidential system -- modeled on the U.S. system, the Maoists claim -- with a directly-elected president holding office for five year terms, limited to two terms. The Nepali Congress and UML want a parliamentary system with a ceremonial president as head of state and prime minister as head of government. The Maoists prefer the presidential system because they believe their leader, Prachanda, would likely win a presidential election, but they are less sure they will secure a majority of the parliamentary seats. The Congress and UML fear that the Maoist-proposed presidential system would lead to authoritarianism and want robust checks and balances.

Electoral System

¶10. (SBU) The Nepali Congress and UML electoral system proposal, approved in committee, would create a mixed first-past-the-post, proportional representation (PR) system, similar to the current electoral framework. The committee recommended a two-house legislature: a 151-member House of Representatives (76 chosen through direct elections, and 75 by PR), and a 51-member National Assembly (38 chosen by provinces and 13 chosen by the House to represent disadvantaged communities, such as Dalits ("untouchables")). By contrast, the Maoists are pushing for a unicameral

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parliament (with 245 members), chosen through a complex, multi-member constituency system which would reserve seats for certain designated groups. This type of system would play to the Maoist political strength among ethnic and other disadvantaged groups.

Land Reform

¶11. (SBU) The Maoists want radical land reform that would place strict limits on the size of plots for individual owners, and deny compensation to current landowners. Reform of Nepal's "feudal" land system is one of the Maoists' key demands, and the party will not compromise easily. The Nepali Congress favors land reform that would "improve economic growth" without new limits on ownership, while the UML generally agrees on limits, but with compensation to current owners.

Judicial Independence

¶12. (SBU) The Maoists, supported in committee by the Terai parties, want to give parliament the authority to approve and dismiss judges by majority vote, and interpret the constitution. The Maoist claim -- with some validity -- that the current judiciary is elitist and unrepresentative. The Nepali Congress and UML charge that the Maoist proposal violates basic principles of separation of powers and judicial independence, a position backed by the Nepal Bar Association and civil society leaders.

May 28 Deadline: Four Scenarios

¶13. (C) Given the number of outstanding issues, complexity in drafting, and tight timeline, we believe it is unlikely that the CA will meet its May 28 deadline. The Interim Constitution does not address this eventuality, only suggesting that a six-month extension is allowed if the drafting is not complete "due to the proclamation of a State of Emergency" (at this stage, we do not anticipate a state of emergency). We see four possible scenarios:

-- Time Extension (Most Likely): The CA amends the interim constitution to extend its own tenure by six months (or

longer) to complete work. Some constitutional experts, including the President's legal advisor Surya Dungal, question whether the CA has this authority, but the lawyers for the major parties, including the Maoists, and UN constitutional experts believe an amendment extending the CA's mandate is permissible. Given the challenges of finishing the constitution on time, the extension may be the preferred solution, if it allows the parties to develop consensus on key issues, gain public buy-in, and ensure careful drafting.

-- Framework Constitution (Possible, but Less Likely): The CA approves a "framework constitution" by May 28, technically meeting the deadline, but leaves the details to the follow-on parliament or some type of commission. UN expert Marcus Brand has encouraged the CA to consider this option. Prachanda called this a "shortcut" constitution (reftel).

-- Drafted on Time (Unlikely): Building on the recent positive momentum, the CA lawyers work hard and complete a full draft on schedule; the CA approves it by May 28. None of the key lawyers believe this is likely.

-- Constitutional "Black Hole" (Unlikely, but Need to Watch): The CA fails to take any action by the end of its mandate (May 28), creating a constitutional void. No one knows what would happen in that case, but four possibilities are most often discussed: (1) the President takes over since his mandate is arguably different than the CA's (a dubious legal theory floated by the President's own lawyer), (2) the Army

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takes over to fill the power vacuum, (3) the country reverts to the 1990 constitution, or (4) the current government simply continues. Given this uncertainty and possible negative impact on the peace process, every effort should be made to avoid the "black hole" scenario. Post will continue to engage the key players, including the President, Nepal Army, and Indian Embassy, to track their thinking about post-May 28 options.
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